

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP JEFFERY REED,

Defendant-Appellant.

UNPUBLISHED

November 21, 2006

No. 263033

Wayne Circuit Court

LC No. 04-012408-01

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by jury of first-degree felony murder, MCL 750.316(1)(b), and armed robbery, MCL 750.529. He was sentenced to life in prison for his felony murder conviction and 17½ to 30 years in prison for his armed robbery conviction. Defendant appeals as of right. We affirm.

Defendant first argues that insufficient evidence was presented to establish the intent necessary to sustain his felony murder conviction. We disagree. This Court reviews a challenge to the sufficiency of the evidence to support a conviction de novo, evaluating the evidence presented in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

Defendant was convicted of felony murder under an aiding and abetting theory. “The ‘requisite intent’ for conviction of a crime as an aider and abettor ‘is that necessary to be convicted of the crime as a principal.’” *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001), quoting *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985). The intent required to support a conviction of felony murder is the malicious intent required for a conviction of second-degree murder. See *People v Flowers*, 191 Mich App 169, 176; 477 NW2d 473 (1991). Thus, to convict a defendant of felony murder on a theory of aiding and abetting, “it . . . must be shown that the [defendant] had the intent to kill, the intent to cause great bodily harm or wantonly and wilfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm” at the time he encouraged or otherwise participated in the offense on which the charge of felony murder is predicated. *Kelly, supra*; see also *People v Barrera*, 451 Mich 261, 294-295; 547 NW2d 280 (1996). Because the facts and circumstances of a killing may give rise to an inference of malice, a jury may infer such intent from the use of a deadly weapon in the commission of the underlying crime. *Flowers, supra* at 176-177; see also *People*

v Carines, 460 Mich 750, 759; 597 NW2d 130 (1999) and *People v Turner*, 213 Mich App 558, 567, 572; 540 NW2d 728 (1995), overruled in part on other grounds in *Mass*, *supra* at 627-628. An aider and abettor's state of mind may also be inferred from defendant's participation in the planning or execution of the crime. *Carines*, *supra* at 757-758.

Here, when viewed in the light most favorable to the prosecution, the evidence showed that the murder victim, Leslie Riley, had a habit of leaving for work at around 5:00 a.m. and picking up the employees who worked for him, including Ben Mitchell, a friend of defendant. The evidence further showed that at around 5:00 a.m. on the morning of the incident, defendant and a masked man, who was armed with a "long rifle," attacked Riley outside his home where they beat him with the rifle. The two then forced Riley and Ameera Jasim, who had spent the night with Riley, back into Riley's house where they continued to beat and demand money from Riley until he was shot and killed by the masked man. Defendant and the masked man then left the home with some of Riley's property. This evidence was sufficient to support a rational trier of fact in concluding that defendant acted intentionally or recklessly in pursuit of a common plan of armed robbery and that defendant knew that the masked man was armed when they commenced that plan. Consequently, there was sufficient evidence to support defendant's conviction of felony murder as an aider and abettor. *Kelly*, *supra* at 278-279; *Turner*, *supra*.

Defendant next argues that the trial court's aiding and abetting and felony murder instructions were improper and failed to adequately protect his right to a properly instructed jury. We conclude that this issue was waived when defense counsel expressed his satisfaction with the jury instructions. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000) (one who waives his rights may not seek appellate review of a claimed deprivation of those rights, for his waiver extinguishes any error).

Defendant next argues that he was denied his constitutional right to a fair trial through misconduct of the prosecutor, whom defendant asserts knowingly permitted Jasim to falsely testify at the preliminary examination that she had not been previously convicted of a crime involving truth or dishonesty. We disagree. Because defendant failed to preserve this argument below, he must demonstrate plain error that affected his substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

A prosecutor may not knowingly use false testimony and has a constitutional obligation to correct false evidence if he knows or "can be deemed to have known" that his witness lied. See *People v Lester*, 232 Mich App 262, 275-276; 591 NW2d 267 (1998). Furthermore, when a prosecutor knowingly presents false material testimony at a preliminary examination, understands that the witnesses will tell a significantly different story at trial, and fails to cooperate with discovery requests designed to help the defense anticipate the witness' trial testimony, reversal is required. *People v Thornton*, 80 Mich App 746, 749-750; 265 NW2d 35 (1978).

The record indicates that Jasim denied during her testimony at the December 2004 preliminary examination in this matter that she had been convicted of "any crime involving truth or dishonesty within the last ten years." At trial, however, it was established that Jasim had been convicted of third-degree retail fraud in July 2004. In *People v Parcha*, 227 Mich App 236, 246-247; 575 NW2d 316 (1997), this Court held that a retail fraud conviction is considered a theft crime that does not contain elements of dishonesty or false statements unless the proponent

establishes that the factual circumstances underlying the conviction show that the crime contained additional dishonest circumstances. Here, however, there is nothing in the record from which this Court can ascertain whether Jasim's retail fraud conviction contained an element of dishonesty or false statement. Consequently, defendant has failed to show that Jasim lied when she denied having been convicted of "any crime involving truth or dishonesty within the last ten years." Furthermore, even if it were found that Jasim's third-degree retail fraud conviction involved "truth or dishonesty," defendant has failed to establish that the prosecutor knew or could be deemed to have known of Jasim's conviction at the time of the preliminary examination, and thus, defendant has failed to establish plain error warranting relief. *Thomas, supra*.

Defendant next argues that the trial court abused its discretion when it denied his motion to admit Jasim's prior conviction for third-degree retail fraud to impeach her as a witness at trial. We review a trial court's decision whether a prior conviction may be used to impeach a defendant for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

Pursuant to MRE 609, evidence that a witness has been convicted of a crime may not be admitted unless the crime: (1) contained an element of dishonesty or false statement, or (2) contained an element of theft, was punishable by more than one year in prison, and has significant probative value on the issue of credibility. Here, after moving to admit Jasim's third-degree retail fraud conviction into evidence for the purpose of impeaching her as a witness, defense counsel acknowledged that the conviction was "not punishable by more than one year." The trial court thereafter denied defense counsel's motion on the ground that Jasim's conviction was for a theft crime not "punishable by imprisonment in excess of one year or death," and thus, did not meet the requirements of MRE 609.

On appeal, defendant argues that the trial court erred in reaching its conclusion in this regard, as it should have evaluated the conviction as one containing an element of dishonesty or false statement. We disagree. As discussed above, whether a retail fraud conviction contained an element of dishonesty or false statement depends on the factual circumstances underlying the conviction. *Parcha, supra*. Here, however, the record fails to demonstrate that Jasim's retail fraud conviction contained an element of dishonesty or false statement. Thus, we conclude that the trial court properly applied the provisions of MRE 609 regarding theft crimes when determining if Jasim's conviction should be admitted into evidence, and did not abuse its discretion when it denied defendant's motion to admit Jasim's conviction into evidence under MRE 609 for purposes of impeaching Jasim. For this same reason, we reject defendant's claim that the trial court erred in failing to admit Jasim's denial of having ever been convicted of a crime involving truth or dishonesty at the preliminary examination for purposes of impeaching the credibility of her testimony at trial. Indeed, as discussed above, there is no basis on this record to conclude that the witness' denial in this regard was not truthful.

Defendant next argues that the trial court abused its discretion when it allowed several witnesses to relay Jasim's out-of-court statements through their testimony at trial. We disagree with defendant's argument regarding the testimony of Gloria McMillan, and further, hold that defendant has abandoned his arguments regarding the testimony of Tia Harris, Cindy Woods, and Ezavier Cash, because he has failed to identify or otherwise address what portion of their testimony he challenges on appeal. See *People v Kevorkian*, 248 Mich App 373, 389; 639

NW2d 291 (2001) (holding that failure to brief a question on appeal is tantamount to abandoning it). Contrary to defendant's assertion, our review of the evidence indicates that McMillan's testimony regarding Jasim's statements was properly admissible as an excited utterance under MRE 803(2). A victim's out-of-court statements are admissible under the excited utterance exception to the hearsay rule where the statements (1) have arisen out of a startling event, (2) were made before there has been time to contrive and misrepresent, and (3) relate to the circumstances of the startling occurrence. *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979). Here, McMillan testified that Jasim was "hysterical, real nervous, real tense, fidgety, [and] talking real fast" when she arrived at work shortly after the incident in question and told McMillan that the masked man involved in the incident called the "other guy Little Phil," and that she may have recognized "Little Phil" from a Thanksgiving gathering at Mitchell's house. Given this testimony, which was consistent with that offered by Jasim and several other witnesses testifying at trial, we find no basis to conclude that the McMillan's testimony was improperly admitted at trial.

Defendant's final argument on appeal is that he was denied his constitutional right to the effective assistance of counsel. Again, we disagree. When reviewing a claim of ineffective assistance of counsel for which an evidentiary hearing has not been held, our review is limited to the facts contained on the record. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether the facts in the record suggest that defendant has been deprived of his right to the effective assistance of counsel presents a question of constitutional law that we review de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Counsel's performance must be measured against an objective standard of reasonableness and without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Likewise, trial counsel is not ineffective for failing to make a futile motion or argument. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

We reject defendant's arguments that he was denied his constitutional right to the effective assistance of counsel when his trial counsel failed to object to the trial court's jury instructions on aiding and abetting and felony murder. A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. *People v Hawthorne*, 265 Mich App 47, 57; 692 NW2d 879 (2005), rev'd on other grounds 474 Mich 174 (2006). A trial court must clearly present the case to the jurors and instruct them on the applicable law. *Id.* at 51. Jury instructions must therefore include all the elements of the charged offenses and any material issues, defenses, and theories, which are supported by the evidence. *Id.* "Jury instructions are reviewed in their entirety. There is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly represented to the jury the issues to be tried." *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994).

The trial court's instructions on aiding and abetting and felony murder were identical to the Michigan Criminal Jury Instructions. See CJI2d 8.1 and CJI2d 16.4.¹ Furthermore, the instructions were legally accurate. *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004); *Carines, supra* at 759. Thus, we conclude that the instructions sufficiently protected the rights of defendant and fairly represented to the jury the issues to be tried, and thus, any objection to the instructions would have been futile. *Holt, supra*. Indeed, defendant has presented no authority that supports a finding that the standard instructions that were given are improper. Therefore, we conclude that defense counsel's behavior did not fall below an objective standard of reasonableness when he failed to object to the questioned instructions. Accordingly, defendant was not denied his constitutional right to the effective assistance of counsel when his trial counsel failed to object to the instructions. *Toma, supra*; *Ackerman, supra*.

We likewise reject defendant's arguments that he was denied his constitutional right to the effective assistance of counsel when his trial counsel failed to object to the trial court's application of MRE 609 and allegedly erroneous ruling on his motion to admit Jasim's prior conviction for purposes of impeaching her as a witness. As already discussed, the trial court properly applied MRE 609, and properly denied defendant's motion to admit Jasim's third-degree retail fraud conviction. Thus, any objection to the trial court's application of MRE 609 or subsequent denial of defendant's motion would have been futile. Accordingly, defendant was not denied his constitutional right to the effective assistance of counsel when his trial counsel failed to object to these matters. *Ackerman, supra*.

We also reject defendant's arguments that he was denied his constitutional right to the effective assistance of counsel when his trial counsel failed to pursue the argument that Jasim's alleged untruthfulness during her preliminary examination should be allowed into evidence to impeach her as a witness. As discussed above, defendant has failed to establish that Jasim lied during her preliminary examination when she stated that she had not been convicted of any crimes involving truth or dishonesty within the past ten years. Thus, he has failed to show that it would not have been futile for defense counsel to pursue an argument that the fact that Jasim lied during her preliminary examination should be allowed into evidence to impeach her as a witness. Accordingly, defendant was not denied his constitutional right to the effective assistance of counsel when his trial counsel failed to pursue the aforementioned argument. *Ish, supra*.

Affirmed.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski

¹ We note that the Michigan Criminal Jury Instructions do not have the official sanction of our Supreme Court. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).